May 5, 2003

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW –A325
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.
Docket No. 02-278

Dear Ms. Dortch:

Set forth herein are the comments of MBNA America Bank, N.A. ("MBNA") as solicited in the Further Notice of Proposed Rulemaking adopted on March 24, 2003 by the Federal Communications Commission ("FCC"; "Commission") regarding rules and regulations implementing the Telephone Consumer Protection Act ("TCPA"; "TCPA Rules"). MBNA incorporates by reference comments previously filed in this proceeding on December 9, 2002 (as revised December 10, 2002) and on January 31, 2003.

Introduction

Although the Commission is required by law to adopt an approach to telemarketing regulation that is both independent and balanced, the recently enacted Do-Not-Call Implementation Act requires the Commission to "consult and coordinate with the [FTC] to maximize consistency" with the FTC's rule. And while the House Committee Report accompanying H.R. 395 notes that "...it is not the intent of the Committee to dictate the outcome of the FCC's pending rulemaking proceeding", the same report immediately thereafter emphasizes the Committee's desire and intention to "prevent situations in which legitimate users of telephone marketing are subject to conflicting regulatory requirements (House Report 108-8, p.9). It appears that, protestations to the contrary notwithstanding, the

FTC and Congress expect that their actions will influence greatly, if not predetermine, the outcome of the FCC's deliberations.

To the contrary, MBNA does not believe the outcome of the Commission's deliberations can or should be preordained, and believes it is both appropriate and necessary to submit further comments in this proceeding. Our comments will be focused on an issue of critical importance in determining whether the Commission can and should "maximize consistency" with the FTC's Final Amended Rule. That issue concerns the need for a uniform, national framework for the regulation of telemarketing, a framework that requires (a) the preemption of state Do-Not-Call ("DNC") and other state telemarketing laws, and (b) a reaffirmation by the FCC of its exclusive jurisdiction over interstate telemarketing.

Overview of State Telemarketing Laws

State DNC Laws

A total of 29 state DNC laws have been enacted and the passage of new DNC laws has accelerated over the past 3 years. DNC laws are under active consideration in virtually every state that has not enacted one, and it is likely that almost every state will have its own DNC law within 12-18 months.

Although state DNC laws are similar in overall structure, there are significant differences between them. These differences appear to reflect state-specific political considerations and the influence of various consumer and industry groups, rather than thoughtful policy considerations. A few examples serve to illustrate the disparities:

Business Relationship Exemption – The scope and availability of a business relationship exemption varies from state to state:

- A few states exempt only current business relationships.
- Some states include a prior relationship and specify duration of the exemption (e.g.,6, 12, 18, 24 or 36 months after "last activity", or "termination" or "lapse" of the relationship).
- Other states include a prior relationship without specifying the duration of the exemption.
- A couple of states exclude affiliates from the exemption
- One state has no business relationship exemption, even for current relationships.

No state law definition of the business relationship exemption matches precisely the definition in the FTC's Final Amended Rule.

Disparate state-by-state provisions governing the exemption for existing and prior business relationships serve to confuse and burden those who seek to comply with them in a multi-state operating environment. And since they conflict with the federal standard established by the FTC, they should be preempted. See Section A – 3, infra.

Exemptions for Specific Groups – Substantially all state DNC laws contain exemptions for non-profit and political organizations (although there are state-specific differences in the scope of those exemptions). In addition, however, other exemptions written into those laws favor certain influential business groups or categories.

These exemptions vary widely from state to state and further dilute the effectiveness of state legislation. Once again, a few examples illustrate the disparities:

- Alabama: 25 different categories of exempted telemarketing calls, including calls about cable TV, newspapers, funeral services, vacation time shares and book or video clubs.
- Arkansas: motor vehicle dealers, insurance agents, licensed investment brokers
- Florida: newspapers.
- Illinois: certain real estate and insurance agents; certain telecom companies.
- Indiana (which has no business relationship exemption): newspapers that use employees to make the calls; insurance and real estate agents.
- Pennsylvania: fraternal and veterans' organizations.
- Texas: state licensees (e.g. insurance and real estate agents), provided the call is not made by an automated device, requires a face-to-face presentation to complete a sales transaction and the consumer has not told that licensee not to call.

None of the above business-specific exemptions appear in the FTC's FAR, and there appears to be no rationale for them other than the political influence of the exempted groups.

Penalties; Enforcement - Statutory penalties for DNC law violations vary widely from state to state, but they are almost invariably substantial (e.g. AK / CT / ID / KY / MO - $5,000; AZ / FL - $10,000; IN / OR – up to $25,000 per call). In Pennsylvania and Massachusetts penalties increase substantially if the telephone subscriber is over age 65. In Kentucky a third violation is a felony. However, unlike the FTC's Final Amended Rule, few state DNC laws contain "safe harbor" provisions on which telemarketers can rely to protect themselves from liability in the event of inadvertent violations. Even the potential that penalties of such magnitude could result from an unwanted phone call is outrageous.

By and large, states enforce their state DNC laws aggressively. Some states (though not all) are even enforcing their DNC laws against out-of-state telemarketers despite the FCCs exclusive jurisdiction over interstate telephone communications, including telemarketing (see p.7 infra).

Other State Telemarketing Laws

While DNC lists are the most publicized and best-known form of state anti-telemarketing legislation, other regulations have been enacted, or are under consideration, that further burden legitimate telemarketers. For example:

- Five states have changed the permitted calling period from the federal standard (8:00 a.m. – 9:00 p.m.) to 8:00 a.m. – 8:00 p.m.; 7 states do not permit calling before 9:00 a.m.; and one state has proposed 9:00 a.m. – 7:00 p.m. There is great concern that calling period restrictions will become a trend, even where DNC laws are in place.
- Fifteen states prohibit or restrict weekend calling to some extent.
- A proposal in one state would establish a "**Do Call**" list that would require that a telephone subscriber consent in advance to receiving telemarketing calls.
- Numerous other state proposals impose state-specific restrictions covering caller ID services; predictive dialers; prerecorded messages; ADADS; wireless phones; and other telemarketing-related subjects, and many of these laws are being applied to interstate telemarketing. This, despite the fact that such subjects are already comprehensively regulated by federal law and, in most cases, are under the exclusive jurisdiction of the FCC pursuant to the TCPA.

This patchwork of state DNC and other anti-telemarketing laws burdens legitimate companies like MBNA with significant legal, financial and reputational risks. At the same time, they do not provide consumers with any more privacy protection than would be available under a uniform national system.

Overview of MBNA Comments

MBNA's comments address the following points:

A. Preemption of state laws
   1. State DNC laws prevent the careful balancing of rights and interests mandated by the TCPA.
   2. It is not realistic to assume that state DNC laws can and will be harmonized with a national DNC registry.
   3. A uniform national framework for telemarketing regulation needs to be established. State DNC and other anti-telemarketing laws should be preempted.

B. FCC Jurisdiction - The FCC should declare its exclusive jurisdiction over interstate telemarketing.

Discussion

A. Preemption Of State Laws

1. State DNC Laws Prevent The Careful Balancing Of Rights And Interests Mandated By The TCPA.

The FTC did not adopt an approach in its proceeding that showed any particular concern for the commercial speech rights or economic well being of the telemarketing industry. The FTC has, in fact, treated the normal practices of legitimate companies as "abusive telemarketing acts or practices" even though the legislative history of the Telephone Consumer Fraud and Abuse Protection Act states, among other things, that "[in] directing the [FTC] to prescribe rules prohibiting abusive telemarketing activities, it is not the intent of the Committee that telemarketing practices be considered per se 'abusive' " H.R. Rep. 103-20, p. 4. Indeed, the FTC states in its Final Amended Rule: "Each of the amendments in the Amended Rule is intended to better protect consumers from deceptive and abusive telemarketing practices". 68 Fed. Reg. at 4668.

In sharp contrast to the FTC's approach, the FCC is required to pursue a "balancing of rights" approach pursuant to a Congressional mandate that

> "Individuals' privacy rights, public safety interests and commercial freedoms of speech and trade must be balanced in a way that protects individuals and permits legitimate telemarketing practices". TCPA § 2(a).

The TCPA Report and Order is replete with statements emphasizing Congress' intent and direction that the FCC take a "balancing of rights" approach to telemarketing regulation (see MBNA's Reply Comments to the FCC dated 1/31/03, pp.2 – 3 ("MBNA/FCC – 1/31/03). Congress recently reiterated that the balancing requirement is as applicable today as it was in 1991, noting that "the FCC is bound by the TCPA" (House Report 108-8, p.4), which requires the agency to consider "a variety of factors" in evaluating the DNC issue. (Id. at 9).

A fair and reasonable "balancing of rights" cannot be struck when companies engaged in legitimate telemarketing must comply not only with comprehensive federal regulations but also with a maze of confusing, costly and burdensome state DNC and other anti-telemarketing laws that provide no more, and in many instances provide less, consumer privacy protection than federal regulations. Such state laws were not in existence and were certainly not contemplated by the FCC when it considered telemarketing regulation in 1991 and 1995, but they have been – and continue to be – enacted in large numbers over the past several years. The Commission must take such laws into account in its deliberations, and should declare that they are inconsistent with, and render impossible, ".... a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service" TCPA Report and Order, 7 FCC Rcd at 8766.

2. It Is Not Realistic To Expect That State DNC Laws Can And Will Be "Harmonized" With A National DNC Registry.

While the FTC's Final Amended Rule itself does not address the issue of whether its national DNC registry would preempt state DNC registries, the Supplemental Information indicates that the FTC does not intend that state DNC lists be preempted. The FTC does state its intent to "work with those states" that have DNC laws – and with the FCC – to create one "harmonized" DNC registry, but it gives no guidance as to what successful harmonization would look like, how it would be accomplished, or how much it would cost.

MBNA believes there are political and practical problems associated with the FTC's plan that make "harmonization" a practical and political impossibility.

- So far as MBNA knows, there has been no analysis of the cost and technological feasibility of "harmonizing" (i.e., integrating) a federal list and up to 50 different state lists, most of which have been, or are being, developed independently of one other. It is dangerous and wrong to assume that such "harmonization" is technologically practical or affordable, particularly when the consequences of non-harmonization, i.e., the need for continuing compliance with dozens of separate state DNC requirements, are so burdensome for legitimate telemarketers.

- If telemarketing regulation is to have any semblance of fairness and rationality, what is required is harmonization not only of state and federal DNC lists, but also harmonization of other critical provisions of state and federal DNC laws and regulations. Specifically, this means that federal regulations must be "harmonized" with widely disparate state law provisions relating, inter alia, to

- Business relationship exemptions (p. 2, supra);
- Exemptions for specific groups (p. 2, supra);
- Penalties and enforcement (p. 3, supra);
- Other restrictions on telemarketing (p. 3, supra).

A meaningful "harmonization" process would require every state legislature to amend its DNC law in some or all of the above areas, and in other ways, to bring that law in line with federal provisions. Frankly, it is inconceivable that states will agree to a process that requires such actions, yet there can be no real "harmonization" without them. For this reason alone, there is need for a uniform national framework for telemarketing regulation.

3. A Uniform National Framework For Telemarketing Regulation Needs To Be Established. State DNC And Other State Anti-Telemarketing Laws Should Be Preempted.

There is ample evidence supporting the need for a uniform national framework for the regulation of telemarketing. Such a framework would provide strong consumer privacy protection, while recognizing the rights and interests of legitimate companies like MBNA that have found the telemarketing channel to be valuable, cost-effective and beneficial to consumers. In contrast, myriad redundant, costly and administratively burdensome state

DNC and other anti-telemarketing law serves no defensible purpose. MBNA believes such laws should, indeed must, be preempted if the country is to have rational, balanced telemarketing regulation.

Congress did not foresee or intend that states would play any significant role in telemarketing regulation other than as enforcers of federal law. A fair reading of § 227 of the TCPA makes this clear:

- Under the provisions of § 227 (e), the only state laws not preempted by the TCPA and TCPA Rules are those that meet certain clear criteria.

    1. The state law requirements must be intrastate in scope and application. That is, they cannot be applied to, or enforced against, interstate telemarketing.

    2. The state law requirements must be more restrictive than federal regulations; i.e., state laws whose requirements are the same as, or less restrictive than, federal requirements are preempted. Since the basic structures of state and federal (e.g., FTC) DNC registries are the same, the former cannot be said to be "more restrictive" than the latter. With respect to other major provisions of DNC laws:

        - Almost without exception, state DNC laws contain exemptions for business groups or categories (see p. 2, supra) that do not appear in, e.g., the FTC's FAR and will not appear in any other federal law or regulation that may be adopted. These exemptions make state DNC laws less, not more, restrictive than federal law, and should thus cause them to be preempted.

        - Provisions in state DNC laws relating to the existing business relationship exemption and to penalties vary in "restrictiveness" as compared with provisions in federal law (i.e. the FTC's FAR; current TCPA Rules); some state provisions are less restrictive, others more so. Under any circumstances, they contribute to a thoroughly confusing and burdensome regulatory picture.

    3. The state law requirements must not otherwise be preempted by the provisions of § 227 (d), which set technical and procedural standards for all telemarketing calls. Under this subsection, a variety of state law provisions, either included in DNC laws or separately enacted, should already be preempted.

    4. State DNC lists must be incorporated into any "single national database" that may be established under federal law. Clearly, Congress intended that telemarketers would not have to deal with the costs and administrative burdens involved in purchasing, scrubbing and complying with a multitude of state DNC lists.

Given the legislative history and specific provisions of the TCPA, there can be little doubt that Congress expected federal law to occupy the field of telemarketing regulation. MBNA believes the Commission, in the course of amending its regulations, should declare that state DNC and other state telemarketing regulations are preempted. However, the Commission should take into account legitimate issues and concerns related to protection of consumer privacy that have been raised.

In the event the Commission does not believe it has all the authority necessary to preempt state DNC and other state telemarketing laws in their entirety, the Commission should request Congress to amend the TCPA to confer such authority. Hopefully, the Commission could persuade the FTC to join in such request, but that should not be a condition thereof.

B. FCC Jurisdiction

The FCC Should Declare Its Exclusive Jurisdiction Over InterstateTelemarketing.

Another circumstance complicating any effort to "maximize consistency" between FTC and FCC regulation is the fact that some states are applying their DNC laws to interstate telemarketing despite the FCC's exclusive jurisdiction in that area. For example, recent newspaper articles report enforcement actions brought by Missouri and Pennsylvania against out-of-state telemarketers based on alleged violations of the state's DNC law. It is likely that – because of the threat of legal liability and adverse publicity – numerous companies engaged in interstate telemarketing are complying with state DNC laws from which they should be exempt.

The FTC does not deal with this issue in its FAR, but the FCC should do so in its forthcoming regulations, as some states are exceeding the limits of their regulatory authority and infringing on FCC exclusive jurisdiction. In its Reply Comments in this proceeding MBNA addressed this issue at length and requested a clear statement by the Commission of its indisputably exclusive jurisdiction over interstate telemarketing. See MBNA/FCC – 1/31/03, pp. 9-11. We would add that the legislative history of the TCPA emphasizes repeatedly that states do not have authority over interstate communications, including interstate telemarketing communications.

Conclusion

For the foregoing reasons, MBNA requests that the Commission:

(a) Take, or declare its support for, such actions as may be necessary to preempt state DNC and other state anti-telemarketing laws.

(b) Reaffirm its exclusive jurisdiction over interstate telemarketing and declare that states have no authority to enforce their DNC and other anti-telemarketing laws against interstate telemarketing activities.

Respectfully submitted,

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